

WORKERS' COMPENSATION ADVISORY COUNCIL

MINUTES ~ FEBRUARY 2, 1998 MEETING [1:00 P.M.]

**710 JAMES ROBERTSON PARKWAY
HEARING ROOM, FIRST FLOOR
ANDREW JOHNSON TOWER
NASHVILLE, TENNESSEE**

The meeting was called to order by Mr. Neeley.

Voting members in attendance:

Mr. Carter H. Witt, Temporary Co-Chair
Mr. James G. Neeley, Temporary Co-Chair
Mr. Bob Pitts
Mr. Jack Gatlin
Mr. Othal Smith, Jr.

Nonvoting members in attendance:

Mr. Jerry Mayo
Ms. Jacqueline B. Dixon
Ms. Abbie Hudgens [via speaker conference call]

Ex officio members in attendance:

Mr. Al Bodie, Commissioner of Labor
Mr. Doug Sizemore, Commissioner of Commerce & Insurance

Also present:

M. Linda Hughes, Executive Director
David Wilstermann, Statistical Analyst

The minutes of the November 12, 1997 Workers' Compensation Advisory Council were unanimously approved.

A. REVIEW OF PROPOSED WORKERS' COMPENSATION LEGISLATION

The first item on the agenda was a request from Mr. Dale Sims, on behalf of the Joint Legislative Study Committee on Workers' Compensation, that the Workers' Compensation Advisory Council review and make recommendations concerning the proposed Joint Committee legislation and other worker's compensation legislation recommended to the Joint Committee, but which was not included in the Joint Committee bill.

Mr. Neeley asked the Executive Director to briefly explain each proposed bill and the impact on current law.

The first order of business was consideration of the Joint Committee Bill:

I. SENATE BILL 2973 (GILBERT) / HOUSE BILL 2803 (KISBER)
[JOINT COMMITTEE BILL]

SECTION 1: Amends TCA 50-6-203(a) by changing the statute of limitations on filing a workers' compensation claim by adding a provision to allow a lawsuit to be filed within one year from the date of the authorized voluntary treatment.

Mr. Witt questioned "authorized by whom" and reminded the members that the last change to this section [one year from the date of the last payment of voluntary compensation] was intended to put a time specific component into the law. He voiced concern that if a more general term is used, this could lead to more disputes about when the treatment was rendered. Mr. Smith noted this provision is designed to cover a case in which the carrier has decided to quit paying the bills without notice to the employee and the employee continues to receive treatment from an authorized doctor.

Mr. Witt then questioned how the term "authorized voluntary" will be interpreted. Ms. Jacqueline Dixon suggested the word "voluntary" be deleted because it could cause confusion if the term is not defined. Mr Witt expressed concern as to how "authorized" will be defined. Other members expressed opinions that this term is already in the case law as being an authorized physician chosen from the panel given to the employee or another doctor to which the "treating" doctor refers the employee.

A motion was made by Mr. Neeley to delete the word "voluntary". The motion was seconded by Mr. Witt and unanimously approved by the voting members.

SECTION 2: Amends TCA 50-6-203(b) by adding language to provide the statute of limitations is suspended from the date of the filing of a suit for workers' compensation until the date of any dismissal or nonsuit.

The initial discussion concerned why Sen. Jordan proposed the legislation. It was Mr. Witt's opinion the legislation was to protect the employee's attorney who fails to file a counterclaim when the employer/insurer files the lawsuit. Mr. Neeley expressed the opinion that the purpose was to protect against jump suit filings...to protect against an employer or insurer who decides, after initiating a workers' compensation lawsuit, to file a nonsuit.

Mr. Witt made a motion, seconded by Mr. Pitts, that this section be deleted from the bill. Ms. Dixon reminded the council this proposal was designed to solve problems where some claimants are losing workers' compensation benefits because of the jump suit phenomenon. She urged the Advisory Council to consider the purpose of workers' compensation - which is to protect the worker - and consider supporting this section. A vote was called. Mr. Witt held Ms. Jimmie K. Corder's proxy in her absence. Mr. Witt, Mr. Pitts, and Mr. Witt [Corder proxy] voted for the motion to recommend deletion of the section. Mr. Neeley, Mr. Smith and Mr. Gatlin voted against the motion. The motion failed.

SECTION 3: Amends TCA 50-6-Part 2 to require the Department of Labor to develop a statistical data form, in consultation with the Workers' Compensation Advisory Council and the Administrative Office of the Courts, to be a required element in every workers' compensation settlement or order.

The Executive Director then discussed a proposed revision to this section of the bill and discussed a proposed data form she had prepared. She expressed concerns that the bill, as drafted, does not specify who is responsible to complete the form, does not require the form to be filed with any entity and does not give the Department of Labor authority to direct some other governmental entity to send the form to the Department of Labor.

Commissioner Bodie expressed concerns as to whether the revised proposal would affect the three day window which the Department of Labor is given to approve a proposed settlement submitted to it. Mr. Smith advised some insurers are not having either the court or the Department of Labor approve settlements for less than \$5000. Mr. Witt questioned whether the proposed data form would replace the C29 or if two forms will be required. Mr. Pitts asked for comment from the Department of Labor and Ms. Sue Ann Head, Assistant Commissioner, stated the Department of Labor is also concerned that the original draft contained in the Joint Committee bill is not specific that the form has to be filed with some entity and that the term "completed" is not specific enough. She also said additional data is needed and if this bill is not enacted, then the Department of Labor will be required to revise the C29 form to collect data on other specific issues, such as vocational experience and education.

With regard to the concern of Commissioner Bodie re: the three day window, Ms. Head indicated the Department of Labor could probably handle this by administrative rule to require the form be filed with the Department of Labor at the same time as the proposed settlement agreement.

Mr. Pitts expressed concern as to whether either party would have incentive to not file the form. The general discussion was that both sides would have equal reason to want a final order and without the form the order would not be final. Mr. Witt noted that if a data form is adopted there will need to be education of the system participants.

Mr. Smith moved that the Advisory Council recommend the revised draft of Section 3 which was prepared by Advisory Council staff be substituted for the current Section 3 of Senate Bill 2973. The motion was properly seconded and was passed unanimously.

SECTION 4: Amends TCA 50-6-415 [DATA COLLECTION--REPORTING DATA] to give the Commissioner of Labor the same authority as the Commissioner of Commerce & Insurance.

The Commissioner of Commerce & Insurance raised a concern as to whether the bill, as drafted, would authorize the Commissioner of Labor to enforce violations of insurance laws which are unrelated to workers' compensation. The Workers' Compensation Advisory Council then voted 6-0 to report to the Joint Committee that the Advisory Council has concerns that the provision, as drafted, authorizes the Commissioner of Labor to enforce insurance laws unrelated to workers' compensation.

SECTIONS 5-10: Amends various provisions of TCA 50-9-103 [Drug-Free Workplace issues]

The Executive Director explained each section, giving the intent and impact of each. The only section which evoked any general discussion was Section 9. Ms. Abbie Hudgens raised the question as to whether the language of Section 9 restricts a public employer from testing CDL drivers in conflict with federal law which requires CDL drivers to be tested. The consensus of the Advisory Council members was the language of subsection "d" is probably broad enough to allow testing of CDL drivers because drivers' conduct would impact the safety of others. Loren Frost, Director of the Drug-Free Workplace Program, agreed the section would not prohibit the testing of CDL drivers and confirmed federal law [DOT] requires such testing.

SECTIONS 11-12: Amends portions of TCA 56-47 [Fraud Statutes]

The Executive Director explained section 11 appears to permit a fraud prosecution against an employer who/which intentionally misrepresents the information upon which the computation of workers' compensation premium is calculated. Section 12 attempts to strengthen the fraud statute by revising the penalties for workers' compensation fraud by setting value limits consistent with current theft statutes. After consideration of these proposals, the Advisory Council unanimously recommended these sections for passage.

The second item which Mr. Sims requested the Advisory Council to consider was various workers' compensation legislation proposals which had been made to the Joint Committee, but were not included in its bill:

Item 1: Proposed legislation related to penalties for failure of an employer to obtain the required workers' compensation insurance coverage.

The Advisory Council discussed the proposal and feelings were mixed. Therefore, the Advisor Council voted unanimously to defer to the legislature and to make no recommendations concerning this proposal.

Item 2: Proposed legislation related to the power of the Commissioner of Commerce and Insurance concerning the advisory prospective loss cost filings [would allow the Commissioner to modify the filing in addition to approving or disapproving the filing].

In the discussion of this item, it was noted while the Commissioner of Commerce & Insurance does not currently have the power to modify the loss cost filing, the Commissioner does have the power to disapprove the filing and wait for a new filing by the rate making entity. Mr. Mayo questioned whether the Commissioner should be in the rate making business. Mr. Witt suggested the proposal would not change the current process since the Commissioner already possesses the power to disapprove of the filing and effectively force a new filing to be done.

The representative of the NCCI, Terri Robinson, called to the attention of the Advisory Council that the proposal, as drafted, gives one person the power to pick a specific number without any supporting data or without consideration to recommendations from other entities, including the Advisory Council and actuaries.

After further discussion, the Advisory Council was unanimous in recommending to the Joint Committee that this item be included in the Joint Committee bill.

Items 3 & 4: Proposed legislation related to the location of claims files and the workload of claims adjusters.

This is the legislation which the Advisory Council proposed in 1997. Mr. Mayo inquired whether these provisions would apply to pools and self insured employers as well as insurance carriers. Mr. Witt replied in the affirmative. Others present at the meeting expressed concern that there are many companies which are specialty writers and it is not economically feasible to house an adjuster in the state when they have such a small number of insureds in the state. Mr. Smith reminded the members that current law requires the claims office to be located in Tennessee and he inquired as to why the file and the adjuster would not be housed with the office. Mr. Mayo

commented that every self-insured employer does not currently have a claims office in the state. Mr. Smith stated the intent of the current law is to have the claim actively worked and moved forward. Others present commented the problem may not be where the file is located, but whether the in-state adjuster has authority to attend benefit review conferences and settle the claim. Mr. Mayo requested the Advisory Council to rethink this recommendation and try to develop a more realistic solution to the problems which exist.

With regard to the provision concerning the number of files per adjuster, Mr. Mayo expressed his opinion that the proposal is an attempt to micro manage the insurance industry and that it accomplishes very little except to put more bureaucracy and regulation on an industry that does not need it. Mr. Mayo stated he would like to see the Department enforce the rules already in place before adding more regulation. Mr. Smith expressed concern as to how the Department of Labor could enforce the file number requirement.

The executive director noted that since the initial recommendation of these provisions the Department of Labor had developed the claims handling standards which are designed to regulate the handling of a claim in a more standard manner by all the companies handling workers' compensation claims. After the extensive discussion of the issue, the Advisory Council was of the opinion that these proposals should be deferred until it can be determined if the claims handling standards are having the anticipated effect.

Item 5: Proposed legislation provides an employer with protection against claims of wrongful discharge if the employer discharges an employee based on a drug or alcohol test which was erroneously reported as positive.

The Advisory Council was not aware of a problem in this area and therefore recommended the provision not be included in the Joint Committee bill.

In summary, of the 5 additional items recommended for inclusion in the Joint Committee bill, the Advisory Council was of the opinion that only Item 2 should be included at this time.

The Advisory Council next reviewed and considered other workers' compensation legislation introduced in 1998. The following bills were reviewed and recommendations made:

1. SB 2729 (COOPER) HB 2397 (BUCK)

Proposed legislation to mandate that an employee be reimbursed for travel expenses/mileage to obtain medical treatment if outside a radius of 20 miles from the employee's residence or workplace. The Advisory Council voted unanimously to recommend the bill be amended from 20 miles to 15 miles.

2. SB 2248 (COOPER) HB 2807 (KISBER)

Proposed bill amends TCA 50-6-411 to prohibit an endorsement change [based on the experience of the insured] to a workers' compensation insurance policy at any time other than the inception or renewal date of the policy.

After a general discussion of the council members in addition to solicited comments from audience members [Terri Robinson, Chuck Bidek and Dick Webber] the Advisory Council was unanimous in its position to not recommend the bill for passage.

3. SB 2447 (HAUN) HB 2319 (COLE/DYER)

4. SB 2464 (JORDAN) HB 2320 (COLE/DYER)

The first proposed bill would allow a psychologist to report and testify as to vocational disability based on the AMA Guides; the second bill would permit an employer to place the name of a psychologist on the panel choice provided to the employee.

The Advisory Council was unanimous in its opinion to not recommend passage of either of these bills.

5. SB 2605 (HERRON) HB 2445 (PINION)

This proposal would delete the reference to the county executive from TCA 50-6-207. The Advisory Council did not recommend this bill for passage.

6. SB 2508 (McNALLY)

The proposed legislation would allow an employee to give notice of a work-related injury not only to the employer but also to the employer's workers' compensation carrier. After general discussion of the notification requirements of the Act, the Advisory Council expressed its opinion that this bill would be superfluous and, therefore, recommend the bill not be passed.

7. SB 2677 (KYLE)

This proposed bill would amend TCA 50-6-113 to provide that an individual building a dwelling or structure for personal use would not be deemed "engaged in the construction industry" and would not have to carry workers' compensation insurance. After discussion, the Advisory Council recommended this legislation be passed.

After discussion of the 1998 legislation, the Executive Director requested the Advisory Council recommend to the Joint Committee that the due date of the Advisory Council's annual report be amended from January 1 of each year. Motion was made and seconded to request the Joint Committee to amend the date to May 1 of each year. The motion passed unanimously.

The Advisory Council elected not to review legislation which had been introduced in the 1997 General Assembly.

B. RECOMMENDATION RE: COLLECTION OF DATA ELEMENTS

Mr. Smith then introduced the next item on the agenda as he had requested it be placed on the agenda. He questioned whether the Advisory Council had formally indicated to the Department of Labor the data elements which the Advisory Council recommended for collection by the Department. Assistant Commissioner Sue Ann Head indicated she had received all the information from the Advisory Council [the list compiled from staff]. Mr. Mayo stated that a memo from the Department of Labor to the Advisory Council dated December, 1997 listing the items to be collected did not include all the data elements which the Advisory Council had previously indicated it wished to be collected. Ms. Head indicated that as the Department had worked in developing the computer system, items had been added and she felt all the things the Advisory Council had requested is now going to be included. Mr. Mayo and Mr. Neeley requested the Department of Labor to furnish to the Advisory Council a list of all the data elements which are to be included in the computer system. Ms. Head stated that all the elements which the Advisory Council had requested would be collected during the pendency of the claim, but not all at one time.

C. STATUS REPORT OF EXECUTIVE DIRECTOR

The Executive Director reported the Drug Free Workplace Program rules and regulations will become effective on April 11, 1998 and a copy of the rules was provided to each member. She also reported the data collection portion of the research project should be complete by the end of February and it is anticipated the report can be presented to the Advisory Council in May, 1998. She also advised the staff had been connected to the Department's computer system and she hoped to report on settlements at the same time.

There was no new business or additional matters brought before the Advisory Council and the meeting was then adjourned.